IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION (MDL No. 2406)	**Master File No. 2:13-CV-20000-RDP** **This document relates to Provider-Track cases.**

DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE REGARDING ISSUES THAT REQUIRE RESOLUTION BEFORE REMAND

On October 19, 2023, the Court ordered interested parties to show cause why the Court should not file a suggestion of remand with the Judicial Panel on Multi-District Litigation (the "Panel") for actions transferred to *In re Blue Cross Blue Shield Antitrust Litigation*, MDL 2406 (the "MDL"), for centralized pretrial proceedings. (Doc. 3075 at 7.)[1] Observing that "the Subscriber track ended in a class settlement" and that "[w]hat remains in this MDL is the Provider track litigation", the Court queried "whether the need for consolidated or coordinated pretrial proceedings has ended". (*Id.* at 1.) The Blues agree that the need for consolidated proceedings in the Provider track of the MDL is near completion, but respectfully submit that the Court should address certain motions—that are fully briefed and ready for decision across all cases—ahead of remand.

Specifically, the Blues respectfully submit that the Court should, prior to suggesting remand, issue decisions on at least (i) Providers' Motion for Class Certification (Doc. 2604) (*infra* Section I); and, following the class certification decision, (ii) the four pending motions for summary judgment not contingent on class certification (Docs. 2749, 2750, 2758, 2784) (*infra* Section II). Each of these motions presents issues

[1] References to Doc. __ are citations to the MDL Docket. References to JPML Doc. __ are citations to the Panel Docket.

common to the centralized cases and, therefore, was filed—and should be decided—in all Provider-track cases. Consistent with the operative Eighth Amended Scheduling Order (Doc. 2718), the Blues also respectfully request 60 days following the Court's order on class certification to assess whether that decision raises any additional grounds for summary judgment that would be resolved most efficiently in the MDL ahead of remand. (*Infra* Section III.) Once these items are complete, the Court should revisit whether it is appropriate to suggest remand, as set forth below in the Blues' proposed sequence of events. (*Infra* Section IV.)

PROCEDURAL HISTORY

This MDL was created in 2013, when the Panel consolidated for pretrial purposes certain antitrust cases challenging Blue System rules. In doing so, the Panel found that centralization would "eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary". (Doc. 1 at 3.) Ten years later—after extensive proceedings before this Court, including a class settlement in the Subscriber-track cases (*see* Doc. 3075 at 3–4)—twenty Provider-track cases remain in the MDL.[2] These Provider-track cases, set forth in the attached Appendix A, fall into four categories: (1) four putative class actions originally filed in Alabama (App'x. A entries 1–4);[3] (2) seven putative class actions originally filed in other district courts and transferred to the

[2] Although not the subject of the Court's order to show cause, there is one Subscriber-track opt-out case still pending in the MDL: *Hoover v. Blue Cross & Blue Shield Ass'n*, No. 21-cv-23448 (S.D. Fla.) (filed on September 27, 2021, and transferred to the MDL on February 14, 2022).

[3] Of these cases, *Conway v. Blue Cross & Blue Shield of Ala.*, No. 12-cv-2532 (N.D. Ala.), is the prioritized proceeding. (Doc. 469 at 5.)

MDL at various times between 2012 and 2019 (*id.* entries 5–11);[4] (3) eight class actions filed in various jurisdictions after certain Blue Plans moved to dismiss Providers' claims in Alabama for lack of personal jurisdiction (*id.* entries 12–19);[5] and (4) one individual action brought by an anesthesia provider in Michigan and transferred to the MDL earlier this year (*id.* entry 20). Plaintiffs in each of these actions challenge the same Blue Rules, and all but one (the Michigan complaint, entry 20) seek certification of either a nationwide or Alabama statewide class of providers. *See, e.g.*, *Richmond SA Servs., Inc. v. Blue Cross & Blue Shield of Ala.*, No. 4:16-cv-1140 (S.D. Tex.), Dkt. 1 ¶¶ 334–335 (nationwide); *Caldwell v. Blue Cross & Blue Shield of Ala.*, No. 2:19-cv-565 (N.D. Ala.), Dkt. 1 ¶¶ 1, 434–435 (Alabama).

In 2015, the Court issued a streamlining Order that prioritized the *Conway* case (Doc. 469 at 4), but maintained a mechanism by which motions could be filed in all centralized cases. Specifically, where a pleading was "intended to be applicable to all actions" in the MDL, the Court directed it be labeled "'This Document Relates to All Cases'".[6] (*See* Doc. 6 at 2.) By contrast, "[w]hen a pleading is intended to apply to a specific case, it shall be filed in that specific case and not on the master docket". (*Id.*)

[4] *See* JPML Docs. 145, 171, 310, 327, 354, 429.

[5] Provider counsel has referred to these actions as "belt and suspenders" cases related to personal jurisdiction only. (*See* Doc. 2925 at 1–3.) In the event Providers do not intend to pursue these actions given the Court's denial of all motions challenging personal jurisdiction (*see* Doc. 925), they can be voluntarily dismissed rather than remanded.

[6] The Court and parties also used "This Document Relates to Provider Track Cases" to designate that the filing pertained to all provider cases only (as contrasted with the Subscriber Track).

In 2020, Provider Plaintiffs filed a motion to certify a class of Alabama providers. (Docs. 2604–05, 2642.)[7] Between 2019 and 2021, the parties fully briefed several related *Daubert* motions. (Docs. 2466, 2471, 2476, 2478, 2480, 2631–36, 2639, 2665–66, 2668, 2690–92, 2695, 2707–10.) The caption for the class certification motion and each *Daubert* motion designates that "This document relates to all cases" (Doc. 2604), as does the Court's November 17, 2022 Order requesting supplemental briefing on class certification. (Doc. 3006.)

There are also four fully briefed motions for summary judgment, filed in 2021, which bear the caption "This Document Relates To Provider Track Cases": (i) the Blues' Motion for Summary Judgment on Providers' Damages Claims as Time-Barred and Speculative ("Statute of Limitations Motion") (*see* Docs. 2761–62, 2798, 2823); (ii) the Blues' Motion for Summary Judgment on All Claims Advanced by Non-General Acute Care Hospital Providers and Any Claims Based on Blue System Rules Other than ESAs or BlueCard for Failure to Demonstrate Injury or Damages ("Injury and Damages Motion") (*see* Docs. 2750–51, 2797, 2819); (iii) the Providers' Motion for Partial Summary Judgment on the Blues' Claim to Common-Law Trademark Rights ("Common Law Trademark Motion") (*see* Docs. 2749, 2800, 2821); and (iv) the Providers' Motion for Partial Summary Judgment on the Blues' Single Entity Defense ("Single Entity Motion") (*see* Docs. 2748, 2801, 2820). Each of these four motions thus applies to *all* cases centralized in the Provider Track of the MDL.

[7] Provider Plaintiffs' original motion for class certification filed on April 15, 2019 (Doc. 2416) was administratively removed from the docket on February 13, 2020 (Doc. 2541), and was renewed on October 9, 2020 (Doc. 2604).

Provider Plaintiffs have already agreed that the motions for class certification and summary judgment "address issues common to all Providers and Defendants". (Doc. 2925 at 2–3 (Provider Plaintiffs' 2022 Submission on Remand).)

LEGAL STANDARD

For the convenience of the parties and to promote efficiency, the Panel is authorized to consolidate cases involving common issues of fact for pre-trial proceedings. *See* 28 U.S.C. § 1407(a). The Panel must remand consolidated cases to their transferor jurisdictions "when, at the latest, th[e] pretrial proceedings have run their course". *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998). Prior to the conclusion of pretrial proceedings, the Panel retains discretion to remand and, in exercising that discretion, places great weight on a transferee judge's suggestion of remand. *See In re IBM Peripheral EDP Devices Antitrust Litig.*, 407 F. Supp. 254, 256 (J.P.M.L. 1976); *see also* JPML Doc. 157 at 16–17.

Remand of an MDL "is appropriate when the discrete function performed by the transferee court has been completed and when everything that remains to be done is case-specific". *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holders Derivative Litig.*, No. 08-1916-MD, 2019 WL 11499332, at *3 (S.D. Fla. Nov. 5, 2019) (citations omitted) (holding "remand is not appropriate because common issues central to the core claims of all Plaintiffs yet remain for determination"); *see also In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1196, 1197 (S.D. Ind. 2001) (declining to suggest remand where forthcoming motions might apply to all MDL cases). "In cases where remand has been deemed appropriate prior to the conclusion of all pretrial proceedings, there was no efficiency gain to be had by keeping the case before the transferee court." *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498

F. Supp. 2d 25, 38 (D.D.C. 2007) (citing *In re Baseball Bat Antitrust Litig.*, 112 F. Supp. 2d 1175 (J.P.M.L. 2000)).

ARGUMENT

I. The Court Should Decide Providers' Motion for Class Certification Prior to Remand, and Prior to Ruling on Motions for Summary Judgment.

The Court has stated it intends to rule in the near-term on Providers' Motion for Class Certification and related *Daubert* motions (Docs. 2604–05, 2642, 3025, 3039, 3045 (Class Certification Brs.); Docs. 2466, 2471, 2476, 2478, 2480, 2631–36, 2639, 2665–66, 2668, 2690–92, 2695, 2707–10 (*Daubert* Mots.).) (Doc. 3075 at 6.) The Blues respectfully submit that the Court should do so prior to remand because the Court's ruling will impact all class actions in the MDL (*see infra* Section I.A), and should do so *before* ruling on summary judgment to avoid the problem of one-way intervention (*see infra* Section I.B).

A. The Court's Ruling on Class Certification Is Relevant to All MDL Class Cases.

The Court's ruling on class certification will necessarily impact all of the putative class cases in the MDL. The Panel has previously instructed that "[i]t is desirable to have a single judge oversee the class action issues . . . to avoid duplicative efforts and inconsistent rulings in this area", especially when "most of the actions . . . have been brought on behalf of similar or overlapping classes of" plaintiffs. *In re Res. Expl., Inc., Sec. Litig.*, 483 F. Supp. 817, 821 (J.P.M.L. 1980); *see also In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981) (emphasizing "the need to have a single judge oversee the class action issues in these seven actions to avoid duplicative efforts and inconsistent rulings in this area"). That is the case here, where each of the class action complaints asserts either a nationwide class of providers

(there are 17 such cases, App'x. A entries 2–3; 5–19) or a statewide class encompassing the state of Alabama (there are 2 such cases, App'x. A entries 1, 4). In other words, 19 of the 20 Provider-track cases assert a putative class definition that overlaps with the class sought to be certified by Providers here (*compare* Doc. 2604 (renewed motion for class certification) *with e.g.*, *Am. Surgical Assistants v. Blue Cross & Blue Shield of Ala.*, No. 4:16-cv-1146 (S.D. Tex.), Dkt. 1 ¶ 334)—meaning the Court's decision on Providers' pending Motion for Class Certification will inevitably affect each.

Indeed, in deciding Provider Plaintiffs' Motion for Class Certification, the Court almost certainly will address issues that apply across all Provider-track cases. For example, the Court's November 17, 2022 Order Regarding Additional Briefing indicated the Court intends to address whether to define the market for healthcare financing as a two-sided platform (as the Blues submit it should). (*See* Doc. 3006 at 2 ("[T]he appropriate time to properly define the relevant market is now.").) The Court may also decide key questions regarding the need for Article III standing for each putative class member in light of the Eleventh Circuit's recent guidance on that issue. (*See id.* at 3 ("How does *Drazen* apply to this antitrust case, if at all?").) The Court's answers to those questions will likely bear upon all Provider-track actions, including those involving claims of non-Alabama providers. Similarly, many of the Blues' arguments in opposition to class certification apply equally to *any* putative class that may be asserted in this litigation—for example, whether it is appropriate to lump together various types of providers, with various degrees of bargaining power, and that operate in disparate geographies. (Doc. 2605 at 31–35, 41–44.) As a result, it is most efficient for the Court to resolve these issues in the context of the MDL. *See In re Managed Care Litig.*, 246

F. Supp. 2d 1363, 1364–65 (J.P.M.L. 2003) (holding it was appropriate for the court to determine in MDL whether to approve class settlement in an individual action because "the class settlement . . . , whether approved or not approved, may have collateral consequences affecting the management of the [MDL] litigation as a whole" and "could have a significant impact on the remaining MDL[] claims"); *see also In re Taxable Mun. Bond Sec. Litig.*, No. CIV. A. MDL-863, 1994 WL 518125, at *1 (E.D. La. Sept. 20, 1994) (declining to suggest remand because "the court is in the process of deciding motions common to the core claims against all defendants, including the issue of class certification and summary judgment motions").[8] Resolving these issues prior to remand would also avoid potentially inconsistent pretrial rulings on class certification issues in courts across the country. In fact, "prevent[ing] inconsistent" class certification rulings was among the very benefits the Panel raised in its original consolidation order. Doc. 1 at 3 ("Centralization will . . . prevent inconsistent pretrial rulings, including with respect to class certification.").

B. Class Certification Should Precede Summary Judgment Under the One-Way Intervention Rule.

Class certification should also be decided *before* the pending motions for summary judgment, which (for the reasons explained below, *infra* Section II) should likewise be decided prior to remand. Under the "'one-way intervention' rule . . . class

[8] For these same reasons, efficiency may also be served by having remand await resolution of any discretionary appeal pursuant to Federal Rule of Civil Procedure 23(f). Should the Eleventh Circuit agree to hear such an appeal, its decision will be binding in five of the Provider-track cases (App'x entries 1–4, 11), and will serve as highly persuasive authority in remand jurisdictions outside this Circuit. This Court may also be best positioned to determine the effect of any Eleventh Circuit decision on the consolidated cases. *See, e.g.*, *In re Holiday Magic Sec. & Antitrust Litig.*, 384 F. Supp. 1403, 1405 (J.P.M.L. 1974) (holding transferee court "is unquestionably in the best position to determine the effect" of an appeal); *accord In re: Tramadol Hydrochloride Extended-Release Capsule Pat. Litig.*, 672 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010); *In re Suess Pat. Infringement Litig.*, 384 F. Supp. at 1407 (noting benefits of consolidation during appeal).

certification should be adjudicated prior to summary judgment so that class members cannot choose their membership in a class after a lawsuit is resolved on the merits."[9] *In re Univ. of Mia. Covid-19 Tuition & Fee Refund Litig.*, No. 20-22207-CIV, 2022 WL 18586131, at *1 (S.D. Fla. Nov. 21, 2022). "'One-way intervention' occurs when the potential members of a class action are allowed to 'await . . . final judgment on the merits in order to determine whether participation [in the class] would be favorable to their interests.'" *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1252 (11th Cir. 2003) (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974)) (declining to address one-way intervention arguments because "we reverse the district court's grant of class certification on other grounds"). "Such 'one-way intervention' . . . is inherently unfair to defendants." *Owens v. Hellmuth & Johnson, PLLC*, 550 F. Supp. 2d 1060, 1070 (D. Minn. 2008).

For years now, the parties have agreed that the "one-way intervention rule" counsels the Court to rule on class certification *before* resolving summary judgment on the merits. (Doc. 2384 at 12–13; Doc. 2386 at 4–5 ("Plaintiffs are not requesting that the Court rule on dispositive motions prior to class certification. Therefore, their proposed schedule does not even implicate one-way intervention."); Doc. 2452 at 3; Doc. 2379 at 7 ("[A]ny decision on Plaintiffs' dispositive motions [before deciding class

[9] In a recent unpublished decision, the Eleventh Circuit declined to adopt a flat prohibition against one-way intervention, but still directed that "district court[s] should rule on certification before summary judgment whenever it's 'practicable' to do so". *Sos v. State Farm Mut. Auto. Ins. Co.*, No. 21-11769, 2023 WL 5608014, at *16 (11th Cir. Aug. 30, 2023) (quoting Fed. R. Civ. P. 23(c)(1)(A)). Here, resolving Providers' Motion for Class Certification prior to summary judgment—and all such motions prior to remand—is "practicable", will serve the interests of judicial economy, and will allow all remaining actions to "benefit from further coordinated proceedings as part of the MDL". *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d at 1197. Thus, *Sos* supports following the one-way intervention rule in this case, and in any event does not prevent it. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent.").

certification] would be premature under the one-way intervention rule.").) Consequently, the Court should first decide Provider Plaintiffs' Motion for Class Certification in the context of the MDL, and only then decide the motions for summary judgment applicable to all cases.[10]

II. Efficiency Requires the Court To Decide the Pending Motions for Summary Judgment Filed in All Cases.

Each of the four pending motions for summary judgment (listed *supra* at 4) presents certain issues common to the Provider-track cases. Resolving these motions prior to remand promotes the purposes of the MDL, including efficiency, conservation of resources, and prevention of inconsistent rulings.

Courts routinely recognize that it is proper to decide summary judgment motions as part of consolidated pre-trial proceedings. *See In re: Photochromic Lens Antitrust Litig.*, No. 8:10-cv-2040, 2014 WL 12618105, at *2 (M.D. Fla. July 9, 2014) ("The disposition of summary judgment motions is part of the 'pretrial proceedings' for which a case is transferred.") (citing *In re Butterfield Pat. Infringement*, 328 F. Supp. 513 (J.P.M.L. 1970)). That is particularly true where the summary judgment motions involve issues common across cases. *See, e.g.*, *In re Taxable*, 1994 WL 518125, at *1 (declining to suggest remand before deciding summary judgment motions "common to the core claims against all defendants"); *Manual for Complex Litigation (Fourth)* § 22.36 (2004) ("If the summary judgment motions involve issues common to all the cases centralized

[10] To the extent the Court were to certify any class of Alabama providers, the rule against one-way intervention would also counsel toward deciding summary judgment *after* the opt-out period for the certified class expires. *See London*, 340 F.3d at 1252–53 ("Rule 23(c)(2)'s requirement that, in opt-out class actions, notice be given to all class members as soon as practicable was intended by Congress to prevent one-way intervention."). Because the Blues maintain that no class should be certified for all the reasons set forth in our class certification briefing (Docs. 2605, 3039), we respectfully submit that the Court need not address that issue here.

before the MDL court, however, the transferee judge may be in the best position to rule."). Resolution of these motions prior to remand furthers the purposes of MDL centralization, including promoting "the just and efficient conduct of this litigation" by "prevent[ing] inconsistent pretrial rulings . . . and conserv[ing] the resources of the parties, their counsel and the judiciary". *In re: EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 268 F. Supp. 3d 1356, 1359 (J.P.M.L. 2017).

Here, each pending summary judgment motion addresses core legal issues common to the MDL cases, and this Court is uniquely familiar with the pertinent record. If not decided in the MDL, these issues will need to be addressed repeatedly—with the risk that they are decided inconsistently—in the transferred cases following remand.

Providers' Single Entity Motion **(Doc. 2784)**. Providers' Single Entity Motion seeks to re-litigate an issue already addressed by this Court once in the context of the MDL: this Court's 2018 ruling that "there remain genuine issues of material fact as to whether Defendants operate as a single entity as to the enforcement of the Blue Marks". (Doc. 2063 at 35.) Like the first motion on this issue, Providers' Single Entity Motion should be resolved prior to remand to avoid inconsistent rulings as a matter of law on a key defense—namely, whether the Blues are capable of conspiring with respect to governance of the Blue Marks, in violation of Section 1 of the Sherman Act. *See, e.g.*, *In re Photochromic*, 2014 WL 12618105, at *2 ("[A] disposition of summary judgment issues common to the plaintiffs in the transferee court decreases the possibility of inconsistent rulings and conserves the resources of the courts and the parties.").[11]

[11] As set forth in Defendants' opposition to the Single Entity Motion (Doc. 2801), Defendants respectfully submit that the Court's prior ruling was based on at least two erroneous conclusions: (1) that Blue Plans *could* compete with each other *nationwide* in the absence of the challenged conduct, even if

***Providers' Common Law Trademark Motion* (Doc. 2749).** Provider Plaintiffs' Common Law Trademark Motion seeks a ruling that the Blue Plans abandoned their common law trademark rights long before federal registration or, in the alternative, that only the St. Paul and Buffalo Plans ever acquired such common law rights. (*See, e.g.*, Doc. 2749 at 1.) The ruling Providers seek is not only contrary to this Court's 2022 Standard of Review decision (*see, e.g.*, Doc. 2933 at 9–10), but also would have nationwide implications that go well beyond the streamlined action. The Court is also already steeped in these critical trademark issues, making it uniquely suited to resolve them for all cases prior to remand. *See, e.g.*, *U.S. ex rel. Hockett*, 498 F. Supp. 2d at 38 ("This Court's familiarity with the issues in this case . . . indicates that it would be much more efficient to proceed to summary judgment motions in this [MDL] Court rather than to ask the transferor court to play catch-up."); *see also In re Suess*, 384 F. Supp. at 1407 (noting where court "has developed an expertise concerning the complicated subject matter involved in this litigation, [it] is unquestionably in the best position to supervise the pre-trial proceedings of all actions . . . toward their most just and expeditious termination").

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some Plans wanted to do so (*see* Doc. 2063 at 34–35) (in fact, they could not because of the common law trademark rights acquired by at least some Plans (*see, e.g.*, Doc. 2933 at 9–10)); and (2) that there are questions about "the validity and/or enforceability of the [federal Blue] Marks" (*see* Doc. 2063 at 34) (in fact, the federal Blue Marks are valid and enforceable, and that is true even if Plaintiffs' mistaken view of the federal application history were correct (*see* Doc. 2801 at 15 n.8)). For these reasons, the Blues respectfully submit that, upon consideration of Providers' Single Entity Motion, the Court could and should grant summary judgment *in favor of Defendants* on their single entity defense. *See Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 212 F. Supp. 3d 1286, 1291 (S.D. Fla. 2016) ("When a motion for summary judgment is presented to the Court, it opens the entire record for consideration, and the Court may enter judgment in favor of the non-moving party on any grounds apparent in the record, even where there is no formal cross-motion.") (citing *Burton v. City of Belle Glade*, 178 F.3d 1175, 1204 (11th Cir. 1999)). Such a ruling would significantly streamline for the transferor courts the claims that could be pursued on remand.

***Defendants' Statute of Limitations Motion* (Doc. 2758).** Defendants' Statute of Limitations Motion seeks to preclude Providers' damages claims as time-barred and speculative. As explained in the briefing, Providers' damages claims are time-barred because their theory of harm centers around *historical* blocked entry, *i.e.*, conduct that occurred *decades* before the Clayton Act's four-year statute of limitations period in this case; and Providers fail to identify any new conduct occurring during the limitations period that caused the alleged damages Plaintiffs seek. (Doc. 2762 at 14–17.) This theory of harm is identical across the Provider-track class action complaints.[12] As a result, resolving the Statute of Limitations Motion ahead of remand would make the transferor actions more efficient, and a ruling in favor of Defendants on this motion would drastically limit the claims that can be pursued. *See, e.g.*, *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (stating that "[c]onsistency as well as economy is . . . served" by a single judge resolving an issue that "is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation").

***Defendants' Injury and Damages Motion* (Doc. 2751).** Defendants' Injury and Damages Motion seeks a ruling that Provider Plaintiffs have failed to put forward evidence of harm for non-general acute care hospital Plaintiffs or with respect to any Blue Rule other than ESAs or BlueCard. (Doc. 2751 at 1.) Although this motion specifically addresses Providers' model of injury and damages as applied in Alabama, the model itself is not so limited. Indeed, Providers' model appears to apply to all cases in the MDL. (*See, e.g.*, Doc. 2454-6 (Haas-Wilson Report filed in all Provider cases)

[12] *Compare Conway v. Blue Cross & Blue Shield of Ala.*, No. 2:12-cv-2532-RDP (N.D. Ala.), Dkt. 1 ¶¶ 65–69, 73–74 *with The Surgical Ctr. for Excellence, LLLP v. Blue Cross & Blue Shield of Ala.*, No. 5:12-cv-388-MW-CJK (N.D. Fla.), Dkt. 1 ¶¶ 71–72, 79–80 (same).

(referring to the Providers' Consolidated Fourth Amended MDL Complaint and not the individual complaint in the streamlined proceeding); Doc 2454-14 (Slottje Report filed in all Provider cases).) It is therefore most efficient for the Court to resolve this motion before remand, which avoids needless, piecemeal litigation around the country over the same faulty model. *See, e.g.*, *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig.*, 226 F. Supp. 3d 557, 584 (D.S.C. 2017) ("[I]t is inefficient, costly, and contrary to the purposes of the statute to suggest remand without ruling on summary judgment. This Court is familiar with the science and issues present and can dispose of the issues far more quickly and efficiently than dozens of courts spread across the country."), a*ff'd sub nom. In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624 (4th Cir. 2018).

For all of these reasons, the Blues respectfully submit that efficiency dictates that the Court resolve these summary judgment motions prior to remand.

III. Efficiency May Counsel the Court To Address Additional Motions.

To date, the Parties have limited their summary judgment motions to those "not critically dependent on the outcome of class certification". (Doc. 2767 (Order Modifying Eighth Am. Scheduling Order).) This is because the Court's Fifth Amended Scheduling Order stated that "[a]fter issuing a decision on class certification, the court will address dispositive motions that are dependent on the outcome of class certification". (Doc. 2443 at 3; *see also* Doc. 2392 at 3 (same).) Consistent with the Court's prior Order, the Blues respectfully request 60 days from the Court's class certification ruling to assess whether any additional motions (*i.e.,* those dependent on the Court's ruling) would be most efficiently resolved in the MDL. (*See* Doc. 2757 (Defs.' Notice of Other Potential Mots.); *see also* Doc. 2458 (6/20/2019 Hr'g Tr.) at 8:14–24 (The Court:

"[D]epending on what class is certified, it may or may not change significantly the motion practice; but we can't know that until we actually see what's certified. . . . I can see where what class gets certified perhaps, particularly on the provider side, may speak to questions like demonstrable harm, the market definition that gets played out on a rule-of-reason analysis, all sorts of things like that."); *In re W. States Wholesale Nat. Gas Antitrust Litig.*, MDL No. 1566, 2015 WL 9973207, at *1 (J.P.M.L. Aug. 5, 2015) (denying remand where defendants "inten[ded] to file dispositive motions on grounds not previously raised").) This additional period of time need not lead to any inefficiency; the 60 days can run immediately after the Court issues its decision on Providers' Motion for Class Certification, while the Court turns to considering the currently pending summary judgment motions.

IV. The Blues' Proposed Sequence of Events Before Remand.

Based on the above, the Blues respectfully submit that remand should occur after the following sequence of events:

1. The Court decides Providers' Motion for Class Certification.
2. No later than 60 days following the Court's class certification ruling, the parties identify, and seek a briefing schedule for, any further dispositive motions contingent on that ruling.
3. The Court decides the four currently pending summary judgment motions.
4. The Court and parties revisit whether there is anything further to do in the context of the MDL (*e.g.*, additional summary judgment motions dependent on class certification; resolution of any appeal under Rule 23(f)), and complete any such work.

5. The Court files a suggestion of remand with the Panel.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that, ahead of a suggestion of remand, the Court address the remaining issues as set forth herein.

Dated: November 10, 2023

Respectfully submitted,

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Appendix A: Provider-Track Cases in MDL No. 2406

Entry	Case	Court	Alleged Class
Originally Filed in N.D. Ala.			
1.	*Caldwell v. Blue Cross & Blue Shield of Ala.*, No. 2:19-cv-565-RDP (N.D. Ala.)	N.D. Ala.	Alabama
2.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 2:12-cv-2532-RDP (N.D. Ala.)	N.D. Ala.	Nationwide
3.	*Melson v. Blue Cross & Blue Shield of Ala.*, No. 3:13-cv-625-RDP (N.D. Ala.)	N.D. Ala.	Nationwide
4.	*Reyes v. Blue Cross & Blue Shield of Ala.*, No. 2:21-cv-1235-RDP (N.D. Ala.)	N.D. Ala.	Alabama
Originally Filed in Other Jurisdictions and Transferred to N.D. Ala.			
5.	*Am. Surgical Assistants v. Blue Cross & Blue Shield of Ala.*, No. 4:16-cv-1146 (S.D. Tex.)	S.D. Tex.	Nationwide
6.	*Chiropractic Plus, P.C. v. Blue Cross & Blue Shield of Ala.*, No. 4:13-cv-234 (S.D. Tex.)	S.D. Tex.	Nationwide
7.	*Hosp. Serv. Dist. 1 of Parish of E. Baton Rouge, La. v. Blue Cross & Blue Shield of Ala.*, No. 3:15-cv-523-BAJ-SCR (M.D. La.)	M.D. La.	Nationwide
8.	*Houston Home Dialysis, LP v. Blue Cross & Blue Shield of Ala.*, No. 4:19-cv-3791 (S.D. Tex.)	S.D. Tex.	Nationwide
9.	*Quality Dialysis One, L.L.C.*, No. 4:15-cv-3491 (S.D. Tex.)	S.D. Tex.	Nationwide
10.	*Richmond SA Servs., Inc. v. Blue Cross & Blue Shield of Ala.*, No. 4:16-cv-1140 (S.D. Tex.)	S.D. Tex.	Nationwide
11.	*The Surgical Ctr. for Excellence, LLLP v. Blue Cross & Blue Shield of Ala.*, No. 5:12-cv-388-MW-CJK (N.D. Fla.).	N.D. Fla.	Nationwide
Filed in Other Jurisdictions in Connection with Personal Jurisdiction Briefing			
12.	*Conway v. Blue Cross & Blue Shield of Ala.,* No. 2:15-cv-1349-DLR (D. Ariz.)	D. Ariz.	Nationwide
13.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 5:15-cv-4905-DDC-KGS (D. Kan.)	D. Kan.	Nationwide
14.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 3:15-cv-109-RRE-ARS (D.N.D.)	D.N.D.	Nationwide
15.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 3:15-cv-2002-FAB (D.P.R.)	D.P.R.	Nationwide
16.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 2:15-cv-140-SWS (D. Wyo.)	D. Wyo	Nationwide
17.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 2:15-cv-3963-PBT (E.D. Pa.)	E.D. Pa.	Nationwide
18.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 3:15-cv-519-WHB-JCG (S.D. Miss.)	S.D. Miss.	Nationwide
19.	*Conway v. Blue Cross & Blue Shield of Ala.*, No. 1:15-cv-5539-AT (S.D.N.Y.)	S.D.N.Y.	Nationwide
Individual Action			
20.	*Anesthesia Assocs. of Ann Arbor PLLC v. Blue Cross Blue Shield of Mich.*, No. 2:20-cv-12916 (E.D. Mich.)	E.D. Mich.	N/A

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2023, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Karin A. DeMasi*
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